IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1132

JULIO JOSE MARTINEZ HERNANDEZ, ET AL.,
Petitioners,

v.

AIR FRANCE,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Counterstatement

Petitioners' statement of the proceedings below and their statement of the facts are correct insofar as they go. However, respondent wishes to point out the significant additional fact that the present appeal concerns only 3 out of a total of 49 separate actions that have been filed against Air France in the United States District Court for the District of Puerto Rico stemming from the terrorist attack at Lod Airport, Tel Aviv, Israel on May 30, 1972. The 3 cases presently on appeal are the only cases wherein the plaintiffs have alleged that Air France is liable by virtue of the provisions of the Warsaw Convention and the Montreal Agreement. The other 46 actions do not seek to impose liability against Air France under the Warsaw

Convention and the Montreal Agreement. They seek recovery on the basis of alleged negligence of Air France in permitting three Japanese, who caused the deaths and personal injuries, to board Flight No. 132 at Rome, Italy, en route to Tel Aviv, without searching either their persons or baggage. The 3 actions involved in this appeal involve 2 claims for wrongful death and 1 claim for personal injury.* Only 5 plaintiffs are involved in these 3 cases. The other 46 actions filed in Puerto Rico consist of 30 personal injury cases, 12 death cases, and 4 cases involving claims for both death and personal injury. These 46 actions contain a total of 295 named plaintiffs.

In addition to the facts set forth in the petition it should be noted that the district court in its opinion stated: "From the time the passengers stepped out onto the movable stairs leading from the plane, all the facilities they used were owned and operated by the State of Israel or El Al, the Israeli National Airline, not by Air France." (Petitioners' Appendix, p. 14.) Furthermore, the checked baggage from the petitioners' flight was removed from the aircraft by employees of the Israeli Airport Authority, who handle the collection and distribution of checked baggage for all foreign carriers using Lod Airport. (Petitioners' Appendix, pp. 29-30, in the court below.) It should also be stated that the petitioners and other members of the Puerto Rican tour group to Israel were not required to pass through Israeli customs following the collection of their checked baggage. This baggage was to be taken directly to buses for transportation to the group's hotel by

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* The complaints in 3 other cases contained vague references to the Warsaw Convention in jurisdictional allegations. Inasmuch as diversity of citizenship was present in each of these cases, the Warsaw Convention jurisdictional allegations in these complaints were dismissed by Judge Gignoux on Air France's oral motion during the course of the first combined pre-trial conference held in Puerto Rico on November 20, 1975 but their negligence causes of action remained undisturbed.

their local travel agent as soon as all of the baggage had been accumulated. (Petitioners' Appendix, p. 46, in the court below.)

Question Presented

Does Article 17 of the Warsaw Convention, which makes an air carrier liable only for injuries sustained by an international passenger in an accident that "took place on board the aircraft or in the course of any of the operations of embarking or disembarking", apply to injuries to arriving international passengers that occurred more than one-half hour after the passengers had deplaned and after the passengers had entered the airport terminal building, had passed their health and immigration checks, and had proceeded into an area that was not owned, operated, or controlled by their carrier and in which the passengers themselves were not under the carrier's control?

ARGUMENT: REASONS FOR DENYING THE WRIT

POINT I

Court decisions in cases involving post-flight accidents unanimously indicate that the Warsaw Convention and Montreal Agreement are not applicable to petitioners' claims.

Prior to the case at bar, the leading case in the United States involving the interpretation of the phrase "in the course of any of the operations of . . . disembarking" contained in Article 17 of the Warsaw Convention was the decision in *MacDonald* v. *Air Canada,* 439 F.2d 1402 (1st Cir. 1971). As the district court below recognized, and as petitioners apparently conceded in their brief in the circuit court, *MacDonald* is "a case substantially on all fours with the present actions." (Petitioners' Appendix p. 16.)

The plaintiff in *MacDonald* was a passenger traveling on an international ticket who suffered a fall in the Boston International Airport Terminal while awaiting the arrival of her baggage in the baggage delivery and customs claims area of the airport. The circuit court unanimously upheld a directed verdict dismissing the plaintiff's complaint, both upon the ground that she had not proved any negligence and also upon the ground that the provisions of the Warsaw Convention and the Montreal Agreement were not applicable to her case. In the portion of the opinion relating to the Warsaw Convention and the Montreal Agreement issue, the court held *both* that the plaintiff had not shown that there was an "accident" within the meaning of Article 17, and that the plaintiff's fall had not in any case occurred in the course of disembarking operations:

> "We see no basis for finding an accident, the first requirement for invocation of the Convention. . . . On the facts established it seems as reasonable to suppose that some internal condition was the cause of the fall as that the fall was the result of an accident.
>
> "Be this as it may, the Convention requires that the accident occur in the course of disembarking operations. If these words are given their ordinary meaning, it would seem that the operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside of the terminal, even though he may remain in the status of a passenger of the carrier while inside the building. Examination of the Convention's original purposes reinforces this view. . . . Partially in return for the imposition of recovery limits, and partially out of recognition of the difficulty of establishing the cause of an air transportation accident, the Conference also placed the burden on the [carrier] of disproving negligence when an accident occurred. . . . Neither the economic rationale for

> liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of aircraft.* Without determining where the exact line occurs, it had been crossed in the case at bar.

"* Neither does the imposition of liability without fault, as was effected, with respect to United States connected carriage, by the Montreal Agreement. The Agreement, as such, could not change the meaning of Article 17 of the Convention, but we believe its framers assumed the same restricted meaning of that article that we do."

439 F.2d at 1404-1405.

The most recent decision on the subject is *Maugnie* v. *Compagnie Nationale Air France*, 4 Avi. 17,534 (9th Cir., 1977) (Respondent's Appendix, p. A1). In that case the passenger had exited an Air France aircraft and had entered the Orly Airport terminal to go to another gate in order to take a connecting Swissair flight. As she was proceeding from the Air France gate down the hallway to the center of the main terminal, the passenger slipped and fell, incurring the injuries that gave rise to her complaint. The district court concluded that, at the time of her accident, the passenger had deplaned and had reached a safe point inside the airport terminal; furthermore, she had proceeded a substantial distance enroute to the Swissair departure area. Accordingly, the district court held that her injuries were not suffered either onboard the aircraft or in the course of any operations of disembarking. The plaintiff then appealed this decision.

In affirming this decision, the court of appeals followed the broad approach of recent embarkation decisions in *Day* v. *Trans World Airlines, Inc.*, 393 F.Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 45 U.S.L.W. 3273 (Oct. 12, 1976), *rehearing denied*, 45 U.S.L.W. 3573 (Feb. 22, 1977), and *Evangelinos* v. *Trans World Airlines, Inc.*, 14 Avi. 17,101 (3d Cir. 1976), *aff'd on*

rehearing en banc, No. 75-1990 (filed Feb. 4, 1977) (Respondent's Appendix, p. B1). (These decisions are discussed at length in Point II *infra.*) Under this approach the court of appeals in *Maugnie* assessed "the total circumstances surrounding a passenger's injuries, viewed against the intended meaning of Article 17" (Respondent's Appendix, p. A11). Location of the passenger was only one of several factors considered, other factors being the carrier's control over the location of the passenger and the likelihood of injury by causes inherent in air transportation.

The important point here is that, even under this expansive approach, the Court of Appeals for the Ninth Circuit held that passenger Maugnie had completed disembarkation operations within the meaning of Article 17:

> "Appellant's situation contrasts sharply with the status of the passengers in *Day* and *Evangelinos.* There the passengers had obtained their boarding passes and were standing in line at the departure gate, waiting to be searched immediately before boarding. On those facts, it was reasonable for the courts to conclude that the travelers were involved in embarkation operations. Appellant, on the other hand, had deplaned and was heading to the Swiss Air gate to make her connecting flight to Geneva at the time of injury. She had proceeded through a boarding lounge and into a common passenger corridor of Orly Airport which was neither owned nor leased by Air France. Furthermore, she was acting at her own direction and was no longer under the 'control' of Air France. Under these circumstances, we find that appellant had completed disembarkation operations within the meaning of Article 17."

(Respondent's Appendix, pp. A11-12.)

Another federal court case, *Felismina* v. *Trans World Airlines, Inc.,* 13 Avi. 17,145 (S.D.N.Y. 1974), also held

that the Warsaw Convention was inapplicable to an accident involving a passenger that occurred inside the "terminal proper" at John F. Kennedy International Airport in New York. In that case, a passenger, arriving on a TWA flight from Lisbon, left the aircraft by walking through an expandable horizontal "jetway" that led from the aircraft door to the upper level of the terminal building. She walked across this upper level and boarded an escalator to the lower level of the terminal. The health and immigration booths, the baggage claim area, and the customs booths were all on the lower level toward which she was proceeding. She was injured in an accident on the escalator—before she had reached the health and immigration booths where her health card and passport were to be inspected. Her complaint against TWA was not filed within two years, and TWA moved to dismiss the complaint upon the ground that the plaintiff's cause of action was governed by the Warsaw Convention and was time-barred by the two-year period of limitation in Article 29. U.S. District Judge Ward decided otherwise, holding "that by the time plaintiff boarded the down escalator, she had disembarked from defendant's aircraft." Accordingly, it was held that the Warsaw Convention's period of limitation was not applicable to plaintiff's action. Applying *Felismina* to the present cases, it is clear that the passengers involved were inside the terminal building and had completed the post-flight processing that the plaintiff in *Felismina* had not yet even begun. Therefore, since the Warsaw Convention was not applicable in *Felismina,* it is perforce not applicable here.

A similar result was reached in the decision of the Appellate Division, Second Department, New York Supreme Court, in *Klein* v. *KLM Royal Dutch Airlines,* 46 App. Div. 2d 679, 360 N.Y.S. 2d 60 (2d Dep't 1974). That decision affirmed part of a decision of the New York Supreme Court, Kings County, that held the Warsaw Convention to be inapplicable to an action arising out of a

post-flight accident to an infant passenger at a baggage conveyor belt inside the terminal at Lod Airport, Tel Aviv, Israel. In that decision, which involved the very same area of the Lod Airport terminal building as is involved in the present cases, the appellate court in its unanimous decision found that there were unresolved factual questions preventing summary judgment dismissing two of the plaintiffs' causes of action based upon negligence, but the court affirmed the summary judgment dismissing the cause of action based upon the Warsaw Convention and the Montreal Agreement, stating:

> "We agree with Special Term [the branch of the Supreme Court deciding the motion for summary judgment] . . . that plaintiffs, having gotten off the aircraft and arrived safely within the terminal, had disembarked within the meaning of Article 17 of the Warsaw Convention (49 U.S. Stat 3014) (Cf. *MacDonald* v. *Air Canada*, 439 F.2d 1402, 1405)."

The scope of the operations of disembarking under Article 17 has also been the subject of a decision by the highest court of France in *Maché* v. *Air France*, (1967) Revue Francaise de Droit Aérien 343 (Cour d'Appel de Rouen 1967), *aff'd*, (1970) Revue Francaise de Droit Aérien 311 (Cour de Cassation 1970). The French court, interpreting a treaty drafted and debated in its own language, unequivocally stated that as regards accidents occurring on the ground, the Warsaw Convention does not apply beyond the traffic apron. In that case, the plaintiff was being led by two Air France stewardesses across the traffic apron from his plane toward the terminal building. Because of contruction work, he had to take a short-cut through the customs area which was not on the traffic apron proper but off to the side and outside of the terminal building. While crossing the customs area which was on the same level as the traffic apron, and *before he even reached the terminal building*, plaintiff sustained his accident. In reaching its decision that the Warsaw Convention did not apply to this accident, the court stated:

> "Consequently, if the Warsaw Convention regulates, among others, accidents arising on the ground, in the course of the operations of embarking or of disembarking, it is only to the extent that these operations are taking place on the traffic apron. . . ."

Translation from the French; *Maché* v. *Air France*, (1967) Revue Francaise de Droit Aérien 343, 345 (Cour d'Appel de Rouen 197), *aff'd*, (1970) Revue Francaise de Droit Aérien 311 (Cour de Cassation 1970).

In summary, no matter what their approaches, the decisions of the courts of the United States and France are unanimous in indicating that the Warsaw Convention and the Montreal Agreement are not applicable to causes of action for injuries to passengers that occurred more than one-half hour after the passengers had deplaned and after the passengers had entered the airport terminal, passed their health and immigration checks, and proceeded into an area that was not controlled by the carrier and in which the passengers themselves were no longer subject to the carrier's control. In other words, in situations such as the one in the present case, the applicable decisions have consistently held that the passengers were not in the process of performing an act required for disembarkation within the meaning of Article 17 of the Warsaw Convention.

POINT II

No conflict exists betwen the decision of the First Circuit in this case and prior decisions of the Second and Third Circuits.

Having chosen to ignore the fact that decisions of the courts of the United States and France in cases involving *post-flight* accidents are unanimous in indicating that the

Warsaw Convention and the Montreal Agreement are not applicable to their claims herein, the petitioners have chosen to base their application for a writ of certiorari primarily upon an alleged conflict between the First Circuit's decision in the case at bar and two recent decisions of the Second and Third Circuits involving *pre-flight* accidents in an airport terminal, namely *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 45 U.S.L.W. 3273 (Oct. 12, 1976), *rehearing denied*, 45 U.S.L.W. 3573 (Feb. 22, 1977), and *Evangelinos* v. *Trans World Airlines, Inc.*, 14 Avi. 17,101 (3d Cir. 1976), *aff'd on rehearing en banc*, No. 75-1990 (filed Feb. 4, 1977) (Respondent's Appendix, p.).

As this Court is well aware, the *Day* and *Evangelinos* actions involved a terrorist attack at Athens airport on August 5, 1973. That attack occurred in the transit lounge of the airport, as the TWA passengers were lined up to be searched prior to proceeding through the gate to a bus that was to take them across the traffic apron to the waiting aircraft. In *Day*, the Second Circuit rejected TWA's argument that the application of Article 17 should be determined by reference only to the location where the accident occurred, and instead adopted a tripartite test based on activity, control and location which had been expounded by the district court. 528 F.2d at 33. Placing great reliance on the opinion in *Day*, the Third Circuit in *Evangelinos* also cited the factors of "activity" and "control" in reversing the decision of the district court which had granted TWA's motion for summary judgment.

The petitioners admit, as they must, that there is no *open* conflict between the First Circuit's opinion and the opinions in *Day* and *Evangelinos*, since the First Circuit clearly acknowledges the propriety of the tripartite test in determining the applicability of Article 17:

> "We do not view our holding in *MacDonald* as necessarily foreclosing the adoption of the *Day-Evangelinos* tripartite test, and we believe that the nature of a plaintiff's activity when injured, its location, and the extent to which the airline was exercising control over plaintiff at the time of injury are certainly relevant considerations in determining the applicability of Article 17."

(Petitioner's Appendix, pp. 24-25.) The First Circuit's opinion then proceeds to a detailed application of the "activity, location and control" test to the facts of the Tel Aviv massacre, as a result of which the First Circuit held that the tripartite test clearly militated against Article 17 coverage under the facts of this action. (Petitioner's Appendix, pp. 25-26.)

Despite the First Circuit's detailed application of the tripartite test, the petitioners assert that the First Circuit's decision is nevertheless in conflict with *Day* and *Evangelinos*. In making this argument, the petitioners focus upon the First Circuit's majority opinion discussion of the legislative history of Article 17 and the discussion of the relationship of terrorist attacks such as the Tel Aviv massacre to risks inherent in air travel, wherein Judges Coffin and Campbell question some of the underlying assumptions which led to the adoption of the tripartite test by the *Day* and *Evangelinos* courts. The petitioners, therefore, are essentially accusing the First Circuit of paying lip service to the *Day-Evangelinos* tripartite test, and of applying this test in such a restricted fashion as to conflict with the principles of the decisions of the Second and Third Circuits. This argument of the petitioners runs up against the immediate obstacle of Judge McEntee's concurring opinion in the case at bar, which, even with unreserved endorsement of the *Day-Evangelinos* tripartite test, nevertheless concurs with the majority opinion's result.

The primary fallacy of the petitioner's conflict argument, however, is that it totally ignores the fact that both the *Day* and *Evangelinos* decisions specifically discuss the

application of the tripartite test to the *disembarkation* situation, and both decisions indicate that a clear distinction exists between the processes of embarkation and the processes of disembarkation which militate against the application of Article 17 to actions such as the case at bar.

The Second Circuit decision in *Day* was handed down prior to the circuit court opinion in the present action. Nevertheless, in discussing the First Circuit's prior opinion in *MacDonald* v. *Air Canada*, 439 F.2d 1402 (1st Cir. 1971), which is discussed at length in Point I of this brief, the Second Circuit observed as follows:

> "We find *MacDonald* v. *Air Canada*, 439 F.2d 1402 (1st Cir. 1971), cited to us by the appellant, clearly distinguishable. In *MacDonald*, the court declined to construe Article 17 as covering an elderly passenger who fell after disembarking. Mrs. MacDonald was, at the time of her accident, standing near the baggage 'pickup' area, waiting for her daughter to recover her luggage. Mrs. MacDonald was, therefore, not acting, as were the passengers in the case at bar, at the direction of the airlines, but was free to move about the terminal. Furthermore, she was not, as were the plaintiffs here, performing an act required for embarkation or disembarkation."

528 F.2d at 34, n. 8. In the *en banc* opinion of the Third Circuit in *Evangelinos*, handed down following the First Circuit's opinion in the case at bar, the Third Circuit similarly discusses and distinguishes the disembarkation situation and finds no conflict between that decision on the one hand and, on the other hand, the First Circuit's decisions in the case at bar and in *MacDonald* and the French decision of *Maché* v. *Air France:*

> "Neither *MacDonald* v. *Air Canada*, 439 F.2d 1402 (1st Cir. 1971), nor the French case of *Maché* v. *Air France* . . . is inconsistent with the conclusion that 'the operations of embarking' had commenced at the time of the accident in this case. First, both cases involved disembarking, where the nature and extent of the carrier's control over the passenger and the type of activity in which plaintiff was engaged differed significantly from the case at bar.[10]

"[10] The recent case of *Hernandez* v. *Air France*, No. 76-1146 (1st Cir., Nov. 19, 1976), makes clear that the First Circuit's earlier decision in *MacDonald* is not in conflict with the conclusion which we reach here. In *MacDonald*, the plaintiff was injured while she was waiting for her baggage in the baggage claim area of Boston International Airport. She was in no sense under the control of the airline or acting as a part of a group under direct airline supervision. *In Re Tel Aviv*, (D.P.R., Dec. 19, 1975) (No. 518-72, et al.), *aff'd sub nom., Hernandez et al.* v. *Air France*, —— F.2d ——, No. 76-1146 (1st Cir. Nov. 19, 1976), a disembarkation case arising in the same circuit as *MacDonald*, nevertheless apparently subscribes to the *Day-Evangelinos* tripartite (location, activity and control) test, but held that the plaintiff (in *Hernandez*) even under that test could not recover."

(Respondent's Appendix, pp. B9-10.)

Further support for the result reached by the First Circuit in applying the *Day-Evangelinos* test is gathered from an examination of the Memorandum of the United States, as amicus curiae in the *Day* case, filed by the Solicitor General. The conclusion of that Memorandum was that the petition for the writ of certiorari in *Day* should be denied. In so concluding, the Solicitor General was of the opinion that the Second Circuit's decision in *Day* did not create a conflict between circuits that required resolution by this Court:

> "Nor does the decision below create a conflict that should be resolved by this Court. The court of appeals' decision is, of course, in harmony with the Third Circuit's subsequent opinion in *Evangelinos* v.

Trans World Airlines, Inc., supra, and it is consistent with the earlier decision of the First Circuit in *MacDonald* v. *Air Canada,* 439 F.2d 1402. In the latter case, the plaintiff had sustained an injury when she fell in the baggage claim area of an air terminal; the court held that the evidence was insufficient to establish that the fall was an 'accident' within the meaning of Article 17 (439 F.2d at 1404-1405) and that, in the alternative, the fall had not occurred during any of the operations of disembarking (439 F.2d at 1405). The court reached the latter conclusion on the ground that the plaintiff had 'reached a safe point inside of the terminal' (*ibid.*), where she was 'far removed from the operation of aircraft' (*ibid.*). It seems likely that that court of appeals below would have reached the same result on those facts: *although the activity of retrieving baggage is related to the process of disembarking, it is not normally performed subject to the specific directions of the carrier, and it ordinarily is removed both in time and place from the actual deplaning.*"

Memorandum of the United States, pp. 12-13 (emphasis supplied).

Finally, conclusive support for the result reached by the First Circuit in its application of the *Day-Evangelinos* tripartite test to the facts of this action is obtained from the recent decision of the Ninth Circuit in *Maugnie* v. *Compagnie Nationale Air France,* 14 Avi. 17,534 (9th Cir. 1977), a decision of which the attorneys for the petitioners are apparently unaware. In *Maugnie,* which is discussed at length in Point I of this brief, the plaintiff was injured following her deplaning from an Air France aircraft and while she was proceeding down a passenger corridor leading from the Air France gate to the main terminal area. The accident in *Maugnie* thus occurred at an earlier point, both in terms of time and location inside the terminal, than the attack involved in the case at bar. The Ninth Circuit, having the full benefit of the prior decisions of the First, Second, and Third Circuits, held that the accident did not occur in the course of disembarking within the meaning of Article 17. This decision is especially significant, since, like Judge McEntee in his concurring opinion in the present action, the Ninth Circuit completely endorsed the *Day-Evangelinos* tripartite test and based its decision entirely on the application of that test to the facts of that action. The decision of the Ninth Circuit in *Maugnie,* therefore, clearly demonstrates that the petitioners herein are in error in their assertion that the First Circuit incorrectly applied the *Day-Evangelinos* test to the facts of this action.

From the foregoing discussion, it is respectfully submitted that the holding of the First Circuit in the present action is clearly in conformity with the approach to Article 17 of the Warsaw Convention enunciated by the Second Circuit in *Day,* followed by the Third Circuit in *Evangelinos,* and, of course, by the most recent decision of the Ninth Circuit in *Maugnie.* Accordingly, no conflict between circuits exists as to the interpretation of the scope of the phrase "in the course of any of the operations of embarking or disembarking" contained in Article 17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Opinion of United State Court of Appeals for the Ninth Circuit in *Maugnie* v. *Compagnie Nationale Air France*, Decided January 19, 1977.

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIMONE MAUGNIE, *Plaintiff-Appellant,* vs. COMPAGNIE NATIONALE AIR FRANCE, *Defendant-Appellee.*	No. 74-2672 OPINION

[January 19, 1977]

Appeal from the United States District Court
for the Central District of California

Before: DUNIWAY and WALLACE, Circuit Judges, and RICHEY,* District Judge.

RICHEY, District Judge:

On this appeal we are required to interpret the meaning of "disembarking" as used in Article 17 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention"),[1] which provides as follows:

> Article 17. The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking and disembarking* (emphasis added).

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* The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

[1] 49 Stat. 3000 *et seq.* (1934), reprinted at 49 U.S.C. § 1502 Note.

Appellant contends that the district court erred in holding that her injury did not occur in the course of disembarking within the meaning of Article 17. Unpersuaded by appellant's arguments, we affirm.

The facts are not in dispute. In 1971 appellant contracted with Air France, an international air carrier, for flight from Los Angeles, California, to Paris, France, where she was to transfer to Swiss Air for flight to Geneva, Switzerland. When appellant reached Paris, she exited from the Air France plane and entered the Orly Airport terminal to make her Swiss Air connection. She proceeded down the only passenger corridor leading from the Air France gate to the main terminal area. In a hallway between the airline gate and the center of the terminal, appellant slipped and fell, incurring the injuries which gave rise to the complaint. On reviewing the facts, the district court concluded that "[s]ince at the time of her accident, plaintiff had deplaned the Air France aircraft, had reached a safe point inside Orly Airport, and had proceeded a substantial distance en route to the Swiss Air departure area, the injuries complained of were not suffered 'on board the aircraft or in the course of any operations of . . . disembarking.'" C.R. 67. The court thereupon dismissed the complaint with prejudice, pursuant to stipulation of counsel.

The parties are in agreement that the Warsaw Convention was applicable to appellant's flight from Los Angeles to Paris. The sole dispute on this appeal is whether appellant's injury is comprehended by Article 17. To arrive at a workable definition of the term "in the course of . . . disembarking" as used in Article 17, we may properly look to the history and purpose of the Convention and subsequent interpretations thereof. The scope of the Warsaw Convention is a matter of federal law and federal treaty interpretation, and must be determined from an

examination of the "four corners of the treaty." *American Trust Co. v. Smyth,* 247 F.2d 149, 153 (9th Cir. 1957); *Husserl v. Swiss Air Transport Co., Ltd.,* 388 F. Supp. 1238, 1249 (S.D.N.Y. 1975). Moreover, it is well established that treaty interpretation involves a consideration of legislative history and the intent of the contracting parties. *Choctaw Nation v. United States,* 318 U.S. 423, 431-432 (1943); *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 35-36 (2d Cir. 1975), *cert. denied,* —— U.S. —— (Oct. 12, 1975); *Block v. Compagnie Nationale Air France,* 386 F.2d 323, 336-338 (5th Cir. 1967); *Rosman v. Trans World Airlines, Inc.,* 34 N.Y.2d 385, 392, 358 N.Y.S.2d 97, 314 N.E.2d 848, 854 (1974).[2]

The Convention was drafted in the late 1920's when the international air transportation industry was in its beginning stages. In order to provide a favorable environment for the industry's growth, various sovereignties agreed to create a uniform body of law governing the

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[2] Appellant argues that since jurisdiction in this action is based on diversity of citizenship, the district court should have consulted conflicts rules in interpreting the scope of Article 17. It is true that the Warsaw Convention does not create a cause of action, but merely creates a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the injury alleged. *Noel v. Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir. 1957), *cert. den.* 355 U.S. 907 (1957); *Komlos v. Compagnie Nationale Air France,* 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953); *Husserl v. Swiss Air Transport Co., Ltd.,* 388 F. Supp. 1238 (S.D.N.Y. 1975). Thus, conflicts rules are applicable in determining whether a cause of action exists. *E.g., Husserl, supra.* However, the determination of the scope of the Warsaw Convention is a matter of federal law and federal treaty interpretation. Conflicts principles are not applicable in interpreting the words of the Convention; rather, the meaning of Article 17 should be ascertained from the intention of the drafters and the goals of the Convention. *Husserl, supra; Block v. Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967).

rights and responsibilities of passengers and air carriers in international air transportation. *See* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497, 499-500 (1967); *Block v. Compagnie Nationale Air France, supra,* at 326-351, and authorities cited therein. The drafters of the treaty proposed to limit liability for injuries caused by air accidents and, as an offset, proposed a presumption of liability on the part of the air carrier. As originally drawn, the Convention established a presumption of liability with a liability limitation of $8,300 per passenger for injuries comprehended by Article 17. *See* Articles 20, 22 and 23.[3]

In 1965 the United States formally denounced the Warsaw Convention because of the low limitation on damages.[4] Notice of denunciation was withdrawn, however, on the signing of the interim Montreal Agreement. The Agreement, approved by the United States through its Civil Aeronautics Board,[5] established an increased liability limit of $75,000 per passenger for international air transportation involving a location within the United States. Addi-

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[3] Article 20 provides in pertinent part: "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Article 22 provides in pertinent part: "(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs."

Article 23 provides: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

[4] Dept. of State Press Release No. 268, Nov. 15, 1965.

[5] Approved by the Civil Aeronautics Board, May 13, 1966, Order E-23680, 31 Fed. Reg. 7302 (1966).

tionally, the Agreement imposed absolute liability on air carriers, thus eliminating the defense of due care set forth in Article 20(1).[6]

Today the Convention functions to protect passengers from the hazards of air travel and also spreads the accident cost of air transportation among all passengers. *Day v. Trans World Airlines, Inc., supra,* 528 F.2d at 36. Taking a broad view of the term "accident," courts generally have extended air carrier liability to include injuries resulting from such modern air hazards as hijacking and terrorist attacks. *Evangelinos v. Trans World Airlines, Inc.,* Civil No. 74-165 (3d Cir., filed May 4, 1976); *Day v. Trans World Airlines, Inc., supra; Husserl v. Swiss Air Transport Co., Ltd.,* 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd* 485 F.2d 1240 (2d Cir. 1973); *In re Tel Aviv,* 405 F. Supp. 154 (D.P.R. 1975); *Burnett v. Trans World Airlines, Inc.,* 368 F. Supp. 1152 (D. N. Mex. 1973); *but see Hernandez v. Air France,* No. 76-1146, Slip Op., 8-9 (1st Cir., filed Nov. 19, 1976). However, the courts have not been uniform in construing "in the course of . . . embarking or disembarking" as used in Article 17, due perhaps to the ambiguous history of the Convention and the changes in air transportation technology since the original drafting.

In construing "disembarking," several courts have interpreted Article 17 as defining Warsaw coverage primarily by location of the passenger. In *MacDonald v. Air Canada,* 439 F.2d 1402 (1st Cir. 1970), upon which the district court herein relied, injuries sustained by a

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[6] The Montreal Agreement, not a treaty itself but an agreement among the carriers, did not change the text of the Warsaw Convention. Rather, it modified the terms of the Convention with respect to international transportation involving a location in the United States. *See generally* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967).

passenger while awaiting her suitcase in defendant airline's baggage area were held to be outside the scope of the Convention. Relying on the ordinary meaning of the words of the treaty, the First Circuit reasoned that the "operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal, even though he may remain in the status of a passenger of the carrier while inside the building." 439 F.2d at 1405.

Additionally, the court noted that the most important purpose of the Convention was to protect air carriers from "the crushing consequences of a catastrophic accident . . . . Neither the economic rationale for liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of the aircraft." 439 F.2d at 1405.

The First Circuit reaffirmed the *MacDonald* decision in *Hernandez v. Air France, supra,* and at the same time indicated its willingness to consider factors other than location of passenger in interpreting Article 17. There the issue was whether Article 17 comprehended passenger injuries incurred in a terrorist attack while passengers were waiting in the baggage retrieval area of the air terminal. Applying the analysis utilized in *Day* and *Evangelinos,* discussed *infra,* the court considered the location of the passengers and, additionally, the nature of the passengers' activity and whether the passengers were under the control of the carrier at the time of injury. The court found that application of those criteria required the conclusion that the *Hernandez* plaintiffs should not recover under the Warsaw Convention.

While recognizing that the "tripartite test of *Day-Evangelinos*" might be useful for close cases, the court preferred an interpretation of Article 17 which placed at least initial

emphasis on physical location of the passengers. On reviewing the legislative history of the Convention, the court was persuaded that the Convention delegates intended "embarkation and disembarkation" to mean "essentially the physical activity of entering or exiting from an aircraft." Slip Op., 7-8. Moreover, the court was reluctant to expand air carrier liability to cover all acts of in-terminal terrorism, since the risk of such randum violence was deemed not a risk inherent in air travel. The court concluded that the process of disembarkation was completed by the time the passengers had left the aircraft and its immediate vicinity, were inside the terminal and were no longer acting at the direction of the carrier.

In re Tel Aviv, supra, also involved a terrorist attack on passengers who had deplaned and were waiting in the baggage area of the terminal building. Endorsing a test based primarily on physical location of passengers, the district court held that the Convention did not apply. In the court's view, the legislative history of the Convention made clear that the delegates to the Convention intended to exclude from coverage accidents occurring inside an airport terminal building. The court noted that the Warsaw Convention delegates specifically rejected a proposal from the Comité International Technique [d'Experts] Juridiques Aériens (CITEJA) which would have made the carrier liable from the time travelers, goods, or baggage first enter the airport of departure to the moment when they leave the airport of destination. 405 F. Supp. at 157, citing from Minutes, *Second International Conference on Private Aeronautical Law,* October 4-12, 1929, Warsaw (R. Horner and D. Legrez, transl. 1975) (hereinafter *Minutes*). The court concluded that the *MacDonald* test was appropriate:

> [T]he intent of the Warsaw Conference in rejecting the CITEJA draft and in declining to impose in Article 17 the same extent of carrier liability for passengers as

> that provided by Article 18 for goods and baggage[7] was clearly to exclude liability as to passengers for accidents which occur after the passenger "has reached a safe point inside the terminal," and "which are far removed from the operation of the aircraft." (Citations omitted.) 405 F. Supp. at 157.

The court indicated that embarkation and disembarkation might be distinguished for purposes of Article 17, since the embarking passenger must perform certain required acts within the terminal as a condition of completing his journey. In contrast, the disembarking passenger normally "has few activities, if any, which the air carrier requires him to perform" once the passenger has entered the terminal building. At 157 n.2, quoting from *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217, 223 (S.D.N.Y. 1975). Similarly, other courts have denied Warsaw coverage to in-terminal accidents in the context of disembarkation. *Felismina v. Trans World Airlines, Inc.*, 13 Avi. Cas. 17,145 (S.D.N.Y. 1974) (injury on escalator leading to lower level of terminal); *Klein v. KLM Royal Dutch Airlines*, 46 A.D. 2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974) (injury on baggage conveyor belt inside terminal); *cf. Mache v. Air France*, Rev. Fr. Droit [Aérien] 343 (Cour d'Appel de Rouen 1967), *aff'd* Rev. Fr. Droit [Aérien] 311 (Cour de Cassation 1970) (injury in customs area off the traffic apron).

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[7] Article 18 provides broad coverage for goods and baggage: "(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air. (2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever."

On the other hand, the Second and Third Circuits have refused to give a strictly geographical interpretation to the language of Article 17 with respect to "operations of embarking." In *Day v. Trans World Airlines, Inc., supra,* and *Evangelinos v. Trans World Airlines, Inc., supra,* the courts of appeals extended Warsaw coverage to personal injury claims of passengers caught in a terrorist attack in the transit lounge of Hellinkon Airport in Athens, Greece. At the time of the attack, the passengers were standing in line at the departure gate ready to proceed to the aircraft.

In *Day,* the Second Circuit unanimously rejected a "rigid location-based rule" as incompatible with the primary goal of the Warsaw drafters—"to create a system of liability rules that would cover all the hazards of air travel." 528 F.2d at 38.[8] In the court's view, the Montreal Agreement, with its imposition of absolute liability and greatly increased liability limits, demonstrated that protection of the passenger was one of the present-day functions of the Convention. Recognizing that air travel hazards now include terrorism and hijacking and that such perils often spill over into the airline terminal, the court found that injuries resulting from a terrorist attack while passengers were waiting to board were within the scope of Article 17 as modified by the Montreal Agreement.

The court approved of the district court's interpretation of the intended meaning of Article 17. The district judge had rejected the strict location-based formula urged by the airline and had applied instead a tripartite test based on activity (what the plaintiffs were doing), control (at whose

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[8] The Second Circuit viewed the delegates' rejection of the proposal that carrier liability explicitly cover in-terminal injuries as an indicaton of the delegates' preference for a flexible approach. The court felt that the most one could infer from the delegates' action was "a reluctance to cover *all* accidents occurring inside a terminal, not a determination that *no* such accidents should be covered." 528 F.2d at 35 n. 12.

direction), and location. *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D.N.Y. 1975).

Similarly, in *Evangelinos, supra,* the Third Circuit in a two-to-one decision, followed the *Day* analysis and rejected the airline's argument that embarkation operations under Article 17 could never occur inside a terminal building. The court reasoned that neither the language of Article 17 nor the delegates' rejection of the CITEJA draft compelled a conclusion that the draftsmen intended a strict location-based test.

> The most that can be said is that the draftsmen rejected the concept of automatic liability for all accidents within the limits of the aerodrome. Our conclusion that under certain circumstances there may be liability for some accidents within a terminal building is not inconsistent with that intent. Slip Op., 9.

The court felt that it was accommodating the principal concerns of those who opposed the CITEJA proposal[9] without going beyond the plain meaning of Article 17 by taking into consideration "the carrier's control over the passengers and the likelihood of injury by causes inherent in air transportation." Slip Op., 9. *See also Husserl v. Swiss*

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[9] The court noted that the delegates' chief objection to the CITEJA draft was that the proposal would extend carrier liability to injuries incurred when the airline had no control over the passenger. Slip Op., 9 n. 12, citing *Minutes* at 73. The court thus reasoned that where passengers were inside the terminal building but within the control of the airline, they were not automatically excluded from the intended scope of the Warsaw Convention. Chief Judge Seitz, in dissent, urged a more restrictive interpretation of Article 17 which would focus primarily on location of the passenger and secondarily on activity. Under his interpretation, "[o]nly those passengers who have departed from the safety of the terminal and are engaged in the activity of boarding or any of the steps which immediately precede boarding should be granted recovery." Slip Op., 20.

Air Transport Co., Ltd., supra, 388 F. Supp. at 1245-48, giving a flexible interpretation to the phrase "on board the aircraft" as used in Article 17.

On reviewing the authorities cited to us, we find that a rule based solely on location of passengers is not in keeping with modern air transportation technology and ignores the advent of the mobile boarding corridors utilized by many modern air terminals.[10] Today the expandable boarding units have eliminated to a great extent the need for embarkation and disembarkation outside the terminal building. Thus, determining whether passengers were inside or outside the airport terminal at the time of injury should not end the analysis. Further, we note that some commentators have concluded that "control" is the decisive factor. Shawcross and Beaumont, *Air Law* 441-442 (3d Ed. 1966); Matte, *Traite de Droit Aerien-Aeronautique,* 404-405 (1964) (cited in *Day,* 528 F.2d at 37 n. 17.)

In short, since the Convention drafters did not draw a clear line, this Court is also reluctant to formulate an inflexible rule. Rather, we prefer an approach which requires an assessment of the total circumstances surrounding a passenger's injuries, viewed against the background of the intended meaning of Article 17. Location of the passenger is but one of several factors to be considered.

However, even under the more flexible interpretation of the language of Article 17, appellant's claim does not come within the scope of the Convention. Appellant's situation contrasts sharply with the status of the passengers in *Day* and *Evangelinos.* There the passengers had obtained their

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[10] In construing the scope of the Convention, we may properly consider changes in circumstances subsequent to the drafting of the treaty. *See Block v. Compagnie Nationale Air France,* 386 F.2d 323, 336-337 (5th Cir. 1967); *Eck v. United Arab Airlines,* 15 N.Y.2d 53, 203 N.E.2d 640 (1964); ALI Restatement Second of Foreign Relations Law §§ 147, 153.

boarding passes and were standing in line at the departure gate, waiting to be searched immediately before boarding. On those facts, it was reasonable for the courts to conclude that the travelers were involved in embarkation operations. Appellant, on the other hand, had deplaned and was heading to the Swiss Air gate to make her connecting flight to Geneva at the time of injury. She had proceeded through a boarding lounge and into a common passenger corridor of Orly Airport which was neither owned nor leased by Air France. Furthermore, she was acting at her own direction and was no longer under the "control" of Air France. Under these circumstances, we find that appellant had completed disembarkation operations within the meaning of Article 17.

Judgment affirmed.

WALLACE, Circuit Judge, Concurring:

The majority recognizes that application of either the location-of-the-passenger test of *MacDonald v. Air Canada,* 439 F.2d 1402 (1st Cir. 1971), or the tripartite test of *Day v. Trans World Airlines, Inc.,* 528 F.2d 31 (2d Cir. 1975), *cert. denied,* 45 U.S.L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354), results in the same disposition: affirmance of the district court's judgment and denial of recovery to plaintiff Maugnie. It is therefore plainly unnecessary in this case to resolve an important question concerning an international treaty. We ought not to be reaching out to do so.

But if choose I must, I would choose the *MacDonald* test. I agree with the district judge that that test is more in keeping with both a fair reading of the language of Article 17 and the Article's historical derivation. *See generally* Note, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal,* 45 Fordham L. Rev. 369, 370-76, 379-86 (1976). As the First

Circuit just recently noted in *Hernandez v. Air France,* No. 76-1146 (1st Cir. Nov. 19, 1976), *aff'g* 405 F. Supp. 154 (D.P.R. 1975):

> We are persuaded that the delegates [to the Warsaw Convention] understood embarkation and disembarkation as essentially the physical activity of entering or exiting from an aircraft, rather than as a broader notion of initiating or ending a trip.

Slip op. at 7-8. Indeed, all

> courts defining "disembarking" have consistently refused to extend the coverage of the Warsaw Convention to encompass injuries occurring within the terminal. The principle announced in *MacDonald* and followed by the courts in *Felismina* [*v. Trans World Airlines, Inc.,* 13 Av. Cas. ¶ 17,145 (S.D.N.Y. 1974)] and [*In re*] *Tel Aviv* [405 F. Supp. 154 (D.P.R. 1975)], created a standard which emphasized the passenger's location, thereby ending liability when the passenger has reached a "safe" point within the terminal.

Note, *supra,* 45 Fordham L. Rev. at 376.

The *Day* test, on the other hand, suffers from several serious flaws. First, the conclusions reached by *Day,* and by *Evangelinos v. Trans World Airlines, Inc.,* No. 75-1990 (3d Cir. May 4, 1976), *motion for rehearing en banc granted* (June 3, 1976), which follows *Day,* "rest upon a somewhat selective reading of the Warsaw minutes." Note, *supra,* 45 Fordham L. Rev. at 380. In other words, the substantial portions of the legislative history favoring the location test, *see id.* at 380-81, were disregarded.

Second, the *Day* test is bottomed on a social theory of compensation designed to spread the burden of damages from travel to all travelers. By relying on this theory of social engineering, "the *Day* court clearly injected policy

arguments alien to the spirit of the Warsaw convention when drafted in 1929." *Id.* at 385. Moreover, it is not possible, in my view, to implement such a theory under the current terms of the Warsaw Convention without such a torturing of language as to constitute a redrafting. The court in *Day,* unfortunately, engaged in such contortions. If the signatories of the Convention wish to redraft it, they may do so, but the courts should not.

Finally, it seems clear to me that the *Day* test was designed to extend a right of recovery to persons for whom sympathy inspires a method of compensation. The *Day* test was meant to be plaintiffs' law. Yet in many cases it may operate to thwart plaintiffs' attempts to recover the full value of their claims. The Warsaw Convention is a two-edged sword: the basis of liability is strict but at the same time the amount recoverable is limited. *See Mache v. Air France,* [1968] D.S. Jur. 515, [1967] Revue Francaise de Droit Aérien 343 (Cour d'Appel, Rouen), *aff'd,* [1971] D.S. Jur. 373, [1970] Revue Francaise de Droit Aérien 311 (Cass. civ. 1re), where the plaintiff-passenger argued against the applicability of the Warsaw Convention in an effort to avoid its ceiling on recovery. Thus, even if it is accepted on its own terms, the *Day* test may have perverse and unintended consequences.

Accordingly, I concur only in the result.

APPENDIX B

En Banc Opinion of the United States Court of Appeals for the Third Circuit in *Evangelinos* v. *Trans World Airlines, Incorporated*, Decided February 4, 1977.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1990

CONSTANTINE EVANGELINOS, CALLIOPPI EVANGELINOS, ERMA EVANGELINOS, STELLA EVANGELINOS and MARY JULIA EVANGELINOS,

Appellants

v.

TRANS WORLD AIRLINES, INCORPORATED

(D.C. Civil No. 74-165)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 3, 1976

Before SEITZ, *Chief Judge,* and VAN DUSEN and WEIS, *Circuit Judges*

Reargued in banc November 4, 1976

Before SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

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OPINION OF THE COURT

(Filed February 4, 1977)

VAN DUSEN, *Circuit Judge.*

On August 5, 1973, the Transit Lounge of the Hellinkon Airport in Athens, Greece, was the scene of a vicious terrorist attack on the passengers of TWA's New York bound Flight 881. The principal question presented by this interlocutory appeal[1] concerns the liability of Trans World Airlines under the terms of the Warsaw Convention, 49 Stat. 3000, *et seq.* (1934), as modified by the Montreal Agreement of 1966, 31 Fed. Reg. 7302 (1966).[2] The district court concluded that the terms of the Convention were not applicable to the plaintiffs at the time of the terrorist

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[1] By amended order dated June 26, 1975, the district court certified this appeal pursuant to 28 U.S.C. § 1292(b) (232-33a). On July 21, 1975, we granted plaintiff-appellants' petition for permission to appeal. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1332. Plaintiffs are citizens of Ohio. Defendant is incorporated in the State of Delaware and has its principal place of business in New York.

[2] Both the Convention, a treaty officially entitled "A Convention for the Unification of Certain Rules Relating To International Transportation by Air," and the Montreal Agreement are reprinted at 49 U.S.C. § 1502 note (1970).

attack and accordingly granted TWA's motion for partial summary judgment, dismissing the claim under the Warsaw Convention.[3] *Evangelinos v. Trans World Airlines,* 396 F. Supp. 95 (W.D. Pa. 1975). We reverse and remand.

The facts of the attack on which this litigation is based have been exhaustively summarized elsewhere[4] and need not be repeated here. It is enough to state briefly that, at the time of the attack, plaintiffs had already completed all the steps necessary to boarding the aircraft except (1) undergoing physical and handbag searches,[5] and (2) physically proceeding from the search area to the aircraft some 250 meters away. Immediately after Flight 881 was announced over the Transit Lounge loudspeaker, the passengers were instructed to form two lines in front of Departure Gate 4. And, while all but a handful of passengers were standing in those lines awaiting the search procedure,[6]

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[3] The complaint alleged both absolute liability under the Warsaw Convention, as modified, and negligence.

[4] *Evangelinos v. Trans World Airlines, Inc., supra* at 96-98, and *Day v. Trans World Airlines,* 528 F.2d 31 (2d Cir. 1975), *cert. denied,* 45 U.S.L.W. 3280 (U.S., October 12, 1976).

[5] These searches were required and conducted by the Greek Government and were prerequisites of being permitted to leave the airport by plane. TWA had two guards stationed inside the terminal building immediately beyond the search procedure area.

[6] The district court stated that:

". . . entrance to [the Transit Lounge] is restricted to passengers ticketed and scheduled to depart on international flights of the . . . carriers operating out of the terminal and to other personnel, who are not passengers, needed to service the area. . . . At . . . Gate [4], there are two separate lines, one for males and one for females, where there is a handbag search and a physical search made by the Greek Police. There are tables for examination of hand luggage and behind the tables were located two booths for physical search of all persons intending to depart. After the search, passengers would pro-

(footnote continued on following page)

two terrorists fired bursts of automatic weapons fire in the general direction of the TWA queues and hurled hand grenades, which exploded in the vicinity of the passengers.

Under the terms of the Warsaw Convention, as modified, TWA is absolutely liable up to a limit of $75,000. per passenger if an incident which causes passenger injury or death falls within the ambit of Article 17 of the Convention.[7] Article 17 provides:

(footnote continued from preceding page)

> ceed through double doors out of the Transit Lounge where they boarded buses for transportation to the aircraft stationed at some distance from Gate 4.
>
> ". . . Two TWA Security Guards were stationed at Gate 4 as well as at least two passenger service personnel of TWA. After being physically searched, the passengers would have walked to two sets of exit doors which led from the Transit Lounge to a raised terrace attached to the terminal building. Two sets of stairs were located on the east side of the terrace leading to a waiting area where there was a bus . . . intended to carry persons across the traffic apron a distance of approximately 250 meters to where the airplanes were parked for loading.
>
> "At the time of the attack, all eighty-nine passengers scheduled to board TWA Flight 881 had checked in and received their boarding passes. The Plaintiffs had completed the various steps required and began to queue up in two lines preparatory to proceeding through the hand baggage and physical searches. . . .
>
> "Approximately seven Flight 881 passengers had departed through Gate 4, exited the Transit Lounge, and had either boarded or were about to board the bus previously referred to. The great majority of the eighty-nine scheduled passengers for Flight 881 were in line in front of the tables at Gate 4 at the time of the incident. The Plaintiffs were injured while being queued up in line in front of Gate 4 while waiting to be searched."
>
> Pages 97-98 of 396 F. Supp. (footnotes omitted).

[7] As originally conceived and drafted, the Convention effected a bargain in which airline passengers traded a monetary limitation on damages—the equivalent of $8,300. per passenger—for the es-

(footnote continued on following page)

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft *or in the course of any of the operations of embarking or disembarking.*" (Emphasis added.)

TWA does not dispute the district court's conclusion that a terrorist attack on airline passengers is an "accident" within the meaning of Article 17. Thus the central question is whether the attack took place "in the course of any of the operations of embarking . . ."

Our task has been significantly facilitated by the Second Circuit's recent decision in *Day v. Trans World Airlines,* 528 F.2d 31 (2d Cir. 1975), *cert. denied,* 45 U.S.L.W. 3280 (U.S., October 12, 1976), an identical case arising out

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(footnote continued from preceding page)

tablishment of a rebuttable presumption of liability on the part of the carrier for "accidents" falling within the ambit of the Convention. Warsaw Convention, Chap. III. American dissatisfaction with this bargain, especially the limits on damages, ultimately led to the Montreal Agreement, a voluntary agreement between air carriers governing international transportation that involved a United States location. Pursuant to the Agreement, each participating airline filed with the Civil Aeronautics Board a contract under which the damages limit was raised to $75,000. and the various carriers agreed not to assert any of the affirmative defenses provided in Article 20 of the Convention. The effect was contractual creation of a new regime of absolute liability for damages arising from incidents falling within the Convention. For excellent discussions of the background of the Warsaw Convention and the Montreal Agreement, see *Block v. Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968); Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967); Note, Warsaw Convention—Air Carrier Liability For Passenger Injuries Sustained Within A Terminal, 45 Ford. L. Rev. 369 (issue of November 1976).

of the same incident.[8] See also *Leppo v. Trans World Airlines, Inc.*, —— Misc. 2d —— (N.Y. Sup. Ct. No. 21770-1973, Trial Term Part 62, Decision of Mar. 10, 1976, N.Y. County). In the *Day* case, Chief Judge Kaufman, in a thorough and scholarly opinion, carefully analyzed the history and purposes of the Warsaw Convention, as modified. Emphasizing the American experience under the Convention, the current expectation of air carriers governed by the Convention as modified, and the considerations militating in favor of liability in this case, the *Day* court unanimously concluded that the activities of the TWA passengers at the Athens airport fell within the purview of the phrase "the operations of embarking." We agree with the result reached in *Day*, although our reasoning differs slightly, and note that there is a substantial interest in uniformity of decision in this area. *Cf. Block v. Compagnie Nationale Air France*, 386 F.2d 323, 337 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968).

TWA has urged us to devise an easily predictable rule as to when liability attaches. We agree that this is desirable. However enticing as such an approach might

[8] In addition to noting the Supreme Court's denial of certiorari in the *Day* case, counsel have furnished us the Memorandum of the United States, as amicus curiae in that case, filed by the Solicitor General with the Supreme Court in September 1976, concluding that the "petition for a writ of certiorari should be denied." That Memorandum includes a detailed analysis of the relevant sections of the Warsaw Convention, and a consideration of *Evangelinos v. Trans World Airlines, Inc.*, Opinion of May 4, 1976 (3d Cir., No. 75-1990), the panel decision of this court which underlies the instant rehearing in banc, *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971) (stating at pages 12-13 that *MacDonald* appears consistent with *Day* and the May 4, 1976, panel opinion in this case), and *Maché v. Air France*, Rev. Fr. Droit Aerien 311 (Cour de Cassation 1970) (concluding that, to the extent the *Maché* case is inconsistent with *Day*, "the view appears to be in the nature of dictum [and] the extent to which it will be adhered to in future cases may be a matter of some doubt").

be, we cannot accede to the notion that a line can be drawn at a particular point, such as the exit door of an air terminal which leads to the airfield. This is because a test that relies upon location alone is both too arbitrary and too specific to have broad application, since almost every situation and every airport is different. In our view, three factors are primarily relevant to a determination of the question of liability under Article 17: location of the accident, the activity in which the injured person was engaged, and the control by defendant of such injured person at the location and during the activity taking place at the time of the accident alleged to be "in the course of any of the operations of embarking,"[8a] may be relevant to the decision under Article 17, and bear significantly upon the tests of activity and location.

In so recognizing, we place less weight upon carrier control over passengers than did the *Day* court. While control remains at least equally as important as location and activity, it is an integral factor in evaluating both location and activity. A standard based primarily upon these three factors seems best calculated to effect the policies underlying Article 17.

Giving the phrase "in the course of any of the operations of embarking" a common sense construction, we

[8a] For example, the fact that the airline exercised strict control of passengers at the time of checking their baggage near the entrance to the airport terminal building might be irrelevant to the location and activity factors where such control was relinquished and only reassumed after entry into the line formed for going through the gate leading to the walkway or passenger bus transportation to the aircraft. Another possibly relevant factor is whether the cause of the accident is a hazard of air travel as it exists at the time of the accident, since the Warsaw Convention was concerned with such hazards. The extensive use of air travel in international transportation of people has made terroristic attacks common in and near major airport terminals, even though they also take place at other locations. See Note, *supra* note 7, at 382-87 (IV C).

agree with plaintiffs' contention that we must examine the nature of the activity in which plaintiffs were engaged to determine if that activity can fairly be considered part of "the operations of embarking." Nothing in the Convention defines the term "operations of embarking" or otherwise defines the period of liability prior to entering the aircraft door. Nevertheless, for substantially the same reasons expressed in *Day v. Trans World Airlines, supra,* 528 F.2d at 33-34, we believe it is appropriate under all the facts and circumstances of this case to view the preboarding searches as part of the "operations of embarking."

The undisputed facts reveal that, at the time of the attack, the plaintiffs had completed virtually all the activities required as a prerequisite to boarding, and were standing in line at the departure gate ready to proceed to the aircraft. The plaintiffs' injuries were sustained while they were acting at the explicit direction of TWA, and while they were performing the final act required as a prerequisite to boarding buses employed by TWA to take the Evangelinos family to the aircraft. More significantly, at the time these operations had commenced, Flight 881 had already been called for final boarding. As a result, TWA passengers were no longer mingling over a broad area with passengers of other airlines. Instead, acting pursuant to instructions, they were congregated in a specific geographical area designated by TWA and were identifiable as a group associated with Flight 881.

By announcing the flight, forming the group and directing the passengers as a group to stand near the departure gate, TWA had assumed control over the group and caused them to congregate in an area and formation directly and solely related to embarkation on Flight 881. This conclusion is supported by the fact that TWA service personnel were standing at Gate 4, guiding the passengers, and TWA security personnel were present. Under these

circumstances, it is reasonable to conclude that TWA had begun to perform its obligation as air carrier under the contract of carriage and that TWA, by announcing the flight and taking control of the passengers as a group, had assumed responsibility for the plaintiffs' protection. Thus, for all practical purposes, "the operations of embarking" had begun. This conclusion is supported by *Blumenfeld v. Bea,* 1962 Z. Luft. R. 78 (Berlin Court of Appeals 1961), a case which would allow coverage under the facts present here.[9]

Neither *MacDonald v. Air Canada,* 439 F.2d 1402 (1st Cir. 1971), nor the French case of *Maché v. Air France,* Rev. Fr. Droit [Aerien] 343 (Cour d'Appel de Rouen 1967), *aff'd.* Rev. Fr. Droit [Aerien] 311 ([Cour] de Cassation 1970) (reprinted in translation as Exhibit B to appellee's brief), is inconsistent with the conclusion that "the operations of embarking" had commenced at the time of the accident in this case. First, both cases involved disembarking, where the nature and extent of the carrier's control over the passenger and the type of activity in which plaintiff was engaged differed significantly from the case at bar.[10] Further, both the *MacDonald* and *Maché* courts

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[9] In *Blumenfeld,* the plaintiff fell and broke her leg and ankle on the stairs leading from the waiting room for departing passengers to the traffic apron. The Berlin Court of Appeals, in terpreting Article 17, stated that "the air carrier takes charge of the flight passengers when he requests them to go from the waiting room to the aircraft. Already at that time the air carrier begins to carry out the transportation contract, the essential accessory obligation of which consists in providing for the safety of passengers in every respect and in securing the traffic which was begun." (Translation agreed upon by counsel for all parties.)

[10] The recent case of *Hernandez v. Air France,* No. 76-1146 (1st Cir., Nov. 19, 1976), makes clear that the First Circuit's earlier decision in *MacDonald* is not in conflict with the conclusion which we reach here. In *MacDonald,* the plaintiff was injured

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considered the Convention's original goal of developing rules to govern the risks then thought to be inherent in air carriage and concluded, on that basis, that the Convention did not apply because the plaintiffs had reached "safe" points, distant from such risks. *MacDonald v. Air Canada, supra* at 1405; *Maché* v. *Air France, supra.* See also Sullivan, The Codification of Air Carrier Liability by International Convention, 7 Journal of Air Law 1, 20 (1936). Since the danger of violence—whether in the form of terrorism, hijacking or sabotage—is today so closely associated with air transportation, the tripartite test we adopt here is more realistic in determining a "safe place" removed from air transportation risks. Here, ap-

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while she was waiting for her baggage in the baggage claim area of Boston International Airport. She was in no sense under the control of the airline or acting as a part of a group under direct airline supervision. *In Re Tel Aviv,* (D.P.R., Dec. 19, 1975) (No. 518-72, et al.), *aff'd sub nom., Hernandez et al. v. Air France,* —— F.2d ——, No. 76-1146 (1st Cir. Nov. 19, 1976), a disembarkation case arising in the same Circuit as *MacDonald,* nevertheless apparently subscribes to the *Day-Evangelinos* tripartite (location, activity and control) test, but held that the plaintiff (in *Hernandez*) even under that test could not recover. In affirming the district court, the First Circuit endorsed and applied this tripartite test, saying:

> "We do not view our holding in *MacDonald* as necessarily foreclosing the adoption of the *Day-Evangelinos* tripartite test, and we believe that the nature of a plaintiff's activity when injured, its location, and the extent to which the airline was exercising control over plaintiff at the time of injury are certainly relevant considerations in determining the applicability of Article 17. On the facts of this case, however, the application of these criteria require the conclusion that plaintiffs did not have the right to recover under Article 17."

Hernandez, supra, slip op. at 4-5.

Also we note that the plaintiff in *Maché* was arguing against the applicability of the Warsaw Convention and that the court in *MacDonald* held that the plaintiff's injuries in that case were not caused by an "accident" within the meaning of Article 17.

plying that test, we conclude that the plaintiffs were not located in a "safe place," removed from risks now inherent in air transportation.[10a] To reach any other result would be to freeze the Warsaw Convention in its 1929 mold, when air travel was in its infancy, and to ignore current air travel procedures and the special risks created by the type of violence that resulted in this tragedy.

Nor are we convinced by TWA's principal argument that "the operations of embarking" can never occur within the physical confines of an air terminal building and that the Warsaw Convention is, therefore, inapplicable. Starting, as we must, with the actual language used in Article 17, we are struck by the fact that nothing in Article 17 suggests a limitation on the period of liability based strictly on the location of the "operations of embarking or disembarking." To the contrary, the contrast between the phrase "while on board the aircraft" and the phrase "in the course of any of the operations of embarking . . ." indicates that the draftsmen of Article 17 made a conscious choice to go beyond a mere location test. Further, adoption of the strict location test advanced by TWA could lead to differing results resting solely on the fortuity of where passengers are placed at the time of injury. In the absence of plain language compelling such a conclusion, we reject it.

Recognizing that nothing on the face of Article 17 supports its argument, TWA directs our attention to the treaty making history of that Article. The pertinent history consists of debates that centered around Article 20 of the draft Convention prepared by a small committee of experts,

[10a] *In Re Tel Aviv, supra,* which is cited in note 10, *supra,* indicates that these dangers of terrorism are continuing. Terrorist attacks occur where there are concentrations of people in order to secure maximum publicity and, therefore, are common in international airports, due to the large volume of international air travel. The large international airport terminals of 1973 did not exist either in 1929, when the Warsaw Convention was adopted, or in 1934, when the United States adhered to that Convention.

Comité Internationale Technique d'Experts Juridique Aeriens (CITEJA), for consideration at Warsaw. Article 20 of the CITEJA draft provided in part:

> "The period of carriage, for the application of the provisions of the present chapter [Liability of the Carrier] shall extend from the moment when the travellers . . . enter the aerodrome of departure, up to the moment when they leave the aerodrome of destination . . . ."

When the draft Article 20 came up for consideration, it provoked considerable debate between those who endorsed the expansive aerodrome-to-aerodrome period of liability and those who espoused a more restrictive view. Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, 67-84 (R. Horner & D. Legrez transl. 1975) (hereinafter Minutes). Ultimately the principle of aerodrome-to-aerodrome liability was put to a vote and defeated. Minutes at 82-83. The problem of drafting a new article in conformity with the vote was then referred to a drafting committee and Article 17 in its present form emerged.

TWA contends that the rejection of the CITEJA draft demonstrates that the delegates intended to exclude from the period of liability the time during which passengers are inside air terminal buildings. We disagree. While the rejection of the CITEJA draft indisputably reflected an intent to restrist the expansive period of liability envisioned by Article 20, nothing in the debates indicates that the line was finally and unalterably drawn at the walls of airline terminal buildings.[11] Surely if such an explicit line

[11] In 1929, the word "aerodrome" meant the entire airfield property on which there were several buildings used by passengers, as opposed to the single, large, air terminal building characteristic of major airports in this country today.

had been intended, the language of Article 17 would now reflect it. Moreover, the debates indicate confusion among the delegates themselves as to the meaning of the rejection of the CITEJA draft. Minutes at 83-84.[12] We are, therefore, especially reluctant to draw conclusions which are not reflected in the work of a drafting committee that had the advantage of considering the debates contemporaneously.

The most that can be said is that the draftsmen rejected the concept of automatic liability (subject, of course, to the defenses provided elsewhere in the Convention) for all accidents within the limits of the departing or arrival aerodromes. Our conclusion that under certain circumstances there may be liability for some accidents within a terminal building is not inconsistent with that intent.[13]

[12] We do not find the debates as clear as the dissent indicates. Although the delegates agreed that "rejection of [Draft Article 20] led to acceptance of the opposite principle," it is unclear as to what that "opposite principle" was. In *Day, supra,* the Second Circuit concluded that the Convention had adopted the views of Prof. Georges Ripert of France—the "dean of French writers on civil law"—who "proposed that the article be recast in terms broad enough to allow the courts to take into account the facts of each case." 528 F.2d at 34-35. In any event, it is clear from the final language of Article 17 that the strict Brazilian proposal, as articulated by the delegate from Great Britain, which would have limited the period of liability to the time when passengers were "on board the aircraft," was not adopted.

[13] In analyzing this case, as we have, in light of location and activity as well as the carrier's control over the passengers and the likelihood of injury by a cause inherent in air transportation, we have accommodated the concerns of those who opposed the CITEJA draft without doing violence to the language of Article 17. *Cf.* Shawcross & Beaumont, Air Law, at 441-42 (3d ed. 1966); Matte, Traité de Droit Aerien Aeronautique, at 404-05 (1964); Sullivan, *supra.*

The debates indicate that the principal fear was that carriers would be liable for injuries sustained by passengers at times when

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Accordingly, the June 26, 1975, judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

SEITZ, *Chief Judge,* dissenting, with whom ALDISERT and GIBBONS, *Circuit Judges* join.

The basic issue here is one of treaty interpretation, to which a provincial approach is presumably inappropriate.

The majority holds that the defendant airline is strictly liable under Article 17 of the Warsaw Convention for the injuries which plaintiffs sustained within an airport terminal while waiting to board their flight, since those injuries occurred "in the course of . . . the operations of embarking." I believe the majority's interpretation of Article 17 is unsupported by the relevant history of the treaty and is contrary to the views of several signatory countries.

The starting point of my analysis is the policy underlying the enactment of the Warsaw Convention. As originally adopted, the Convention was designed to shield the infant airline industry from potentially crippling damage awards for injuries caused by risks inherent in air transportation. In order to accomplish this objective, the treaty restricted an airline's potential liability to approximately $8,300, in exchange for a presumption that the airline was

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the airline had no control over what the passengers were doing. As Prof. Georges Ripert of France stated:

> "There is real difficulty only for travellers, and this difficulty arises from the fact that the traveller has his independence . . . ." Minutes at 73.

Virtually all delegates agreed that there should be liability while the passengers were onboard the aircraft—a period when the carrier has complete control over both the passengers and their environment.

liable if the accident took place on board the aircraft or during embarkation.

Plaintiffs maintain that the signing of the Montreal Agreement in 1966 marked the rejection of the Convention's original goal and that the Convention, as modified by the Montreal Agreement, is now intended to afford protection solely to the passenger. While it is true that the Montreal Agreement increased the damage limitation to $75,000 and established a system of liability without fault,[1] the Agreement retained in toto the other provisions of the Convention, including Article 17. Thus, while the potential recovery of those previously covered by the Convention was significantly increased, the class of passengers entitled to the treaty's protection and the types of accidents on which liability could be based remained the same. I therefore believe that the Convention's original policy of limiting an airline's liability for personal injuries caused by the unique perils of air navigation retains its vitality, notwithstanding the adoption of the Montreal Agreement. While I am not unmindful of the strong interest in providing injured passengers with an adequate recovery, where their injuries are otherwise within the coverage of the Convention, I believe this goal has been accomplished

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[1] It is significant to note that the United States was initially opposed to the principle of absolute liability since it viewed the fault requirement as a necessary protection for the growth of the airline industry. The subsequent retreat from this position occurred when the $100,000 liability limit which the United States advocated was rejected by the other signatories to the treaty. Following the defeat of this proposal, the effective denunciation of the treaty by the United States appeared imminent. The inclusion of a system of liability without fault which was designed to reduce litigation and to provide quicker settlements was therefore suggested as a compromise measure in order to ensure United States acceptance of the lower liability limits. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967).

through the increase of damage limitations and the elimination of the airline's "due care" defense.

The historical concern of the Convention drafters and delegates was with the unusual and grave risks which were then inherent in air travel. With this principle in mind, it is apparent that a passenger's location has a significant impact on the risks to which he is exposed. The farther a passenger is removed from the immediate vicinity of the airplane itself, the less likely it is that he will be injured by any of the unique perils which accompany air travel.

Certain dangers, such as the danger of skyjacking, are encountered once the passenger has boarded the aircraft. Obviously, the threat of skyjacking is not a substantial risk borne by passengers within the terminal. Hence, while skyjacking has been loosely labeled as a risk associated with air travel, *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D. N.Y. 1972), *aff'd* 485 F.2d 1240 (2d Cir. 1973), it is evident that such activity creates a risk only to those so situated as to be exposed to the danger.

Like skyjacking, sabotage or terrorist activity may pose a threat to passengers boarding or on board an aircraft. To this extent, I agree that terrorism is a risk which accompanies international air travel. I am unable to agree, however, that this particular hazard is an incidental risk of air travel when it occurs within the confines of an airport terminal. Rather, in my view, a terrorist attack inside an airport is no more likely than the bombing of a restaurant, bank or other public place. Accordingly, I believe the majority's conclusion that plaintiffs were injured as a result of a risk inherent in modern air travel is unwarranted. The particular hazards of terrorism which are unique to air navigation are simply not risks to which passengers in plaintiffs' proximity were exposed.

The importance of a passenger's location as it relates to the risks of air travel is underscored by the case law of

this country as well as that of other signatories to the treaty.[2] In the French case of *Maché v. Air France,* Rev. Fr. Droit Arien 343 (Cour d'Appel de Rouen 1967), *aff'd* Rev. Fr. Droit Arien 311 (Cour de Cassation 1970), the highest court in France determined that the Warsaw Convention only governs accidents arising on the ground at locations of the airport where passengers are exposed to aviation risks. In that case a disembarking passenger was led by 2 flight attendants across the traffic apron toward the terminal building. Due to construction work, a detour was taken through a customs area which was not on the traffic apron. The passenger accidentally stepped in a man-hole and was injured. In finding that the Warsaw Convention was inapplicable and did not restrict the passenger's potential recovery, the court ruled that the customs area in which plaintiff was injured was not an area exposed to risks of air navigation. Significantly, the court found that the only ground area where such risks were incurred was the traffic apron.

A case decided by the United States Court of Appeals for the First Circuit, *MacDonald v. Air Canada,* 439 F.2d 1402 (1st Cir. 1971), also stresses the importance of a passenger's location in relation to the hazards of air travel. That case involved a 74 year old woman who mysteriously fell while awaiting her suitcase in the baggage area of an airport. The court affirmed a directed verdict in the

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[2] As the majority correctly notes, there is a substantial interest in uniformity of decision in this area. *Block v. Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967), *cert. denied,* 392 U.S. 905 (1968). I do not believe, however, that the interest in uniform *international* interpretation of the treaty, adverted to in *Block,* compels us to follow the Second Circuit's decision in *Day v. Trans World Airlines,* 528 F.2d 31 (2d Cir. 1975), *cert. denied,* 45 U.S.L.W. 3280 (October 12, 1976), petition for rehearing pending, since that decision is inconsistent with a decision of the highest court in France.

defendant airline's favor on the ground that there was no basis for finding an "accident", the first requirement for invocation of the Convention. In any event, however, the court found that the injuries sustained by plaintiff did not occur during the operation of disembarking since that operation had "terminated by the time the passenger [had] descended from the plane by the use of whatever mechanical means [were] supplied and [had] reached a safe point inside of the terminal . . . ." 439 F.2d at 1405. The court reasoned that the Warsaw Convention was not intended to apply "to accidents which are far removed from the operation of aircraft." *Id.* at 1405.

A determination as to whether a passenger's injuries were sustained in an area exposed to the particular risks of air navigation is thus a necessary first step in deciding whether that passenger was injured during the course of the operations of embarking. Since I believe this threshold determination must be resolved against plaintiffs in this case, I would affirm the judgment of the district court. However, even assuming plaintiffs were injured at a location where the perils of air travel are logically encountered, I do not believe they were injured while in the course of the operations of embarking as required by Article 17. Rather, my reading of the Convention Minutes and the subsequent commentary on the treaty indicates that the delegates viewed the operations of embarking restrictively to include only the actual boarding of the airplane or, at best, the trip across the traffic apron from the terminal building to the plane. Under no circumstances were accidents inside the airport terminal regarded as within the scope of the treaty.

As the majority correctly observes, the present language of Article 17 resulted from the delegates' rejection of Article 20 of the CITEJA draft which would have imposed liability from the time of entry of the "aerodrome of departure" until the time of exit from the "aerodrome of arrival." During the debates on Article 20, several

amendments were proposed to distinguish between the liability for carriage of passengers and that for transportation of goods. A representative example is the proposal by the delegate from Brazil which suggested that the language of Article 20 be amended:

> "to replace 'from the moment when travelers, goods and baggage enter the aerodrome of departure up to the moment when they leave the aerodrome of destination' by 'from the moment when the travelers have boarded and the goods or baggage have been delivered to the forwarder'."

Minutes at 71.

The French Delegation would have amended Article 20 to limit the airlines' liability for injuries to travelers to those injuries sustained during the course of carriage. During the discussions which followed the various proposals, it became evident that there was considerable dissatisfaction among the delegates with the expansive provision for passenger liability embodied in Article 20 and a widespread feeling that the Article should be re-submitted to the Drafting Committee for revision.

Believing that important questions of substance rather than mere matters of re-wording were raised by the several proposed amendments, the delegate from Great Britain suggested that the Convention pass on the substantive issues before referring Article 20 to the Drafting Committee. He remarked as follows:

> "It seems to me that here there are questions of principle upon which one can pass before the referral to the drafting committee.
>
> "For example, as regards travelers, does liability begin, as it is said in the draft, upon the entrance into the aerodrome of departure, or does it begin when the traveler is on board the aircraft? Here is the divergence as it exists as regards the travelers: When must

liability begin? Following the principle established in the draft of the Convention, or simply when the traveler is on board?

"It's a question upon which I ask that one pass before the referral to the drafting committee."

Minutes at 80-81.

These sentiments were echoed by the Reporter for the preliminary draft who stated:

"We should make a decision first of all on the carriage of travelers and then on the carriage of goods. The situation, in effect, can be different.

"In the carriage of travelers, there is a double solution possible: either maintaining the text which would consist in engaging the liability of the carrier as soon as the passenger enters the aerodrome, or accepting the suggestion which was made which consists in saying that the liability of the carrier is engaged as soon as the traveler has embarked on the aircraft.

"I point out again that this last solution, practically, is not one at all, and facilitates nothing at all, because the judge will always have to specify the moment when the liability of the carrier begins. In effect, the passenger can have steped [sic] on the step-up of the aircraft, the step-up which is not an actual part of the aircraft, and be injured by another aircraft.

"Be that as it may, the proposal is very clear."

Minutes at 81.

The substantive question was then called to a vote.

So that there could be no doubt as to the precise question on which the delegates were voting, the delegate from Luxembourg emphasized that

"before deciding to refer to the drafting committee, it is indispensable to vote in the sense of the proposals made by the British delegation, which discriminated

very well between the various cases. When the conference will have made a decision on these points which will be submitted to a vote, then the drafting committee will be able to work in a useful manner."

Minutes at 82.

The Brazilian Delegation likewise reiterated:

". . . I draw the attention of the Assembly to that upon which we are going to vote. It's a question of saying, whether the liability of the carrier begins as soon as the traveler enters into the aerodrome, which is a public place, or when he embarks on the aircraft."

Minutes at 82.

Thereafter, a vote was taken and the proposed draft of Article 20 was defeated. Following revision, the current Article 17 emerged from the Drafting Committee and was adopted.

The majority concludes that the debates indicate confusion among the delegates as to the meaning of the rejection of the CITEJA draft. I am unable to subscribe to this position in view of the overwhelming evidence to the contrary. The objections which were voiced to the CITEJA draft of Article 20 and the several amendments which were proposed during the debates all reflect a common desire on the part of those opposed to the draft Article to restrict a carrier's liability for personal injuries to injuries which occurred on board or while the passenger was embarking. Agreement with respect to this limitation among the delegates who were critical of the CITEJA draft was almost universal. Naturally, certain questions were raised as to whether this alternative proposal would cover injuries sustained "in the case of the aircraft which is still in the hanger, which is on the traffic apron, which is taxiing etc. . . ." Minutes at 77. Questions were also posed as to

whether the proposal would cover a passenger injured on the stairway which leads to the interior of the aircraft. Minutes at 78, 81. None of the factual variations or hypothetical possibilities which were raised, however, even remotely suggested that the restrictive proposal might be construed to cover passengers within the terminal. To the contrary, it was in reaction to the imposition of liability under such circumstances that the proposal was conceived.

I therefore believe that in rejecting the CITEJA draft of Article 20, the delegates intended to signify their approval of a proposal which would limit an airline's liability for personal injuries to those injuries which occurred during flight or while the passenger was boarding. Their subsequent adoption of Article 17 must be viewed as an affirmance of this more restrictive concept of liability. It appears likely that the phrase "during the course of any of the operations of embarking" was inserted in order to make explicit that the Article covered the passenger who was on the stairway preparing to enter the airplane in addition to passengers who had already boarded.

If any confusion existed as to the scope of the terms "embarking" and "disembarking", it was limited to the question of whether the Convention embraced accidents which occurred while the passenger was physically proceeding from the terminal to the plane or whether it covered only mishaps during the actual physical process of boarding. At the Fifth International Congress on Air Navigation—held only 1 year after the Warsaw Convention was drafted—a leading expert on air travel, Mr. D. Goedhuis, presented a paper in which he summarized the prevailing interpretations of Article 17 as follows:

> "Further, art. 17 mentions 'embarquement' and 'debarquement'. The question is how to explain these words? There are two views *viz:* a) in a broad sense: *i.e.* the embarking begins when the passenger leaves the station-building on his way to the aeroplane, standing in the flying-field; the disembarking ends when the passenger, arrived at destination, enters the station-building; b) in a narrow sense, *i.e.:* the getting on board and the alightment only comprise the actual getting in and out of the aeroplane." D. Goedhuis, *Observations Concerning Chapter 3 of the Convention of Warschau 1929, Cinquième Congrès International de la Navigation Aérienne,* 1-6 Septembre 1931 (The Hague 1931) at 1163-64.

While Mr. Goedhuis advocated amending Article 17 to reflect the broad interpretation of "embarking", he was opposed by others, including at least one delegate to the Warsaw conference itself, who argued that the narrow interpretation which confined liability to accidents occuring during the actual process of boarding, was the proper one. It is significant to note, however, that under either interpretation, the injuries suffered by plaintiffs in the instant case would be outside the scope of Article 17. I therefore conclude that plaintiffs were not injured in the course of "embarking" as that term was restrictively intended.

My conclusion is not altered by the modern legal theories of accident cost allocation on which the Second Circuit relies in part in *Day v. Trans World Airlines, supra.* The Second Circuit finds that a broad construction of Article 17 is appropriate since the airline is in the best position to distribute accident costs among all passengers and to assume preventative measures. While I do not question the soundness of these principles in appropriate contexts, I believe that the explicit goals and policies which were voiced by the delegates to the Warsaw Convention and reaffirmed by the signing of the Montreal Agreement in 1966 foreclose reference to them in defining the scope of Article 17. Had the signatories to the Convention wished

to amend it in order to reflect modern developments in American tort law, they could have affirmatively acted in 1966 when the monetary damage limitation was increased and the airline's due care defense was eliminated. Their failure to do so should not be disregarded, particularly if we keep in mind that this is an international agreement.

It is also worthy of note that the majority approach will greatly expand the absolute liability of air carriers while, at the same time, inviting drawn out litigation to determine whether or not such liability attaches. The semi-automatic approach to determining absolute liability which I suggest would seem to more nearly accord with the intent of the drafters of the treaty and the objectives sought to be accomplished.

Having concluded that plaintiffs were injured at a location which was neither exposed to the hazards of air travel nor within the delegates' intended scope of coverage, I would ordinarily end my analysis. However, in view of the majority's emphasis on the activity in which plaintiffs were engaged at the time of injury, I feel compelled to state briefly my views as to the relevance of this factor and to address the majority's argument.

An examination of an individual's activity is only necessary, I believe, once it has been determined that the individual was situated in the immediate vicinity of an airplane where the risks of air travel are logically encountered. Obviously, the physical activity of walking toward a plane on the traffic apron or ascending the stairway to the plane's interior is no different than the activity in which a passenger engages at numerous locations within an airport. The distinguishing feature, therefore, must be the location at which this activity is performed.

Location, while important in identifying the potential class of passengers entitled to recover, is nevertheless not conclusive as to whether an individual passenger was in-

jured while engaged in the operation of embarking. Rather, the injured victim's conduct must also be scrutinized in order to determine whether, objectively viewed, his activities were within the scope of Article 17. Clearly, an individual who is injured at a dangerous location while on a lark of his own cannot be said to be "embarking" and should not be permitted to recover under the Convention. Only those passengers who have departed from the safety of the terminal and are engaged in the activity of boarding or any of the steps which immediately precede boarding should be granted recovery.

Although conceding that plaintiffs had not completed the preliminary steps necessary to boarding their flight in that they had not been searched and had not departed from the search area to board the bus which would take them to their awaiting flight, the majority nevertheless concludes that by standing in line waiting to be searched, plaintiffs were engaged in the activity of embarking. It bases this conclusion on a finding that TWA has assumed control over the passengers and on its belief that terrorist attacks within an airport are inherent risks of modern air travel.

With respect to its assertion that TWA had assumed control over its passengers, the majority proves too much. It cannot be gainsaid that passengers who are actually boarding and even those who are proceeding from the terminal to the plane on the traffic apron are subject to the airline's authority. Control is therefore inherent under the more restrictive interpretation of Article 17 which I have proposed.

It is equally clear, however, that passengers at many locations within the terminal are also, to a large extent, under the control of the airline. The majority's control analysis is therefore, at best, imprecise. In apparent recognition of the over-inclusiveness of its control classification, the majority seeks to impose yet another restriction on the

class of persons who are entitled to recover under Article 17, namely, membership in an identifiable group associated with a particular flight and located within a specific geographical area designated by the airline. In effect, however, this additional restriction elevates location to a position of critical importance. Control becomes a mere artifice to permit recovery within the terminal, yet under limited circumstances. *Blumenfeld v. Bea,* 1962 Z. Luft. R. 78 (Berlin Court of Appeals 1961), relied on by the majority, suffers from the same infirmity.

I therefore conclude that the factors relied upon by the majority in support of its conclusion that plaintiffs were engaged in the activity of embarking are largely irrelevant. Since I believe that plaintiffs' location within the airport terminal precludes their recovery under Article 17, I would affirm the judgment of the district court.